Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

MARJORIE MADERE HOFFMAN VELTEN,

*Petitioner,*

versus

BANK ONE, NATIONAL ASSOCIATION AS TRUSTEE,

*Respondent.*

**On Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeal Of The State Of Louisiana**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Marjorie Madere Hoffman Velten (Velten), Petitioner prays for a Writ of Certiorari issued to review the Louisiana Supreme Court's (2006-00-0040 – La. 9/28/06) refusal of a writ to the Louisiana Fourth Circuit Court of Appeals and that court's opinion, 2004-2001 (La. App. 4th Cir 8/17/05, rehearing denied 12/9/05) 917 So.2d 454, affirming the ruling of the Civil District Court for the Parish of Orleans, State of Louisiana granting Bank One, National Association as Trustee its motion for Summary Judgment that there was no violation of the provision of the Truth in Lending Act as amended by the Home Owners Equity and Protection Act, 15 U.S.C.A. §§1605, 1639 and 12 C.F.R. §§226.1, 226.32 of the Federal Reserve Board (HOEPA).

*Specific issues:*

1.) Whether there were sufficient charges made by the lender that can be classified as "points and fees" to make this a transaction that triggers a HOEPA provision.

2.) Whether the Court of Appeals' reason for not finding sufficient charges to make this a HOEPA loan was due to the fact that it did not apply the amendments of HOEPA to the Truth in Lending Act.

## LIST OF ALL PARTIES

Petitioner Velten was the initial defendant in the trial court and was the appellant in the Fourth Circuit Court of Appeals and the applicant in the writ to the Supreme Court of the State of Louisiana.

Bank One, National Association was the trustee that brought this foreclosure suit. The name of the trust was never disclosed. Bank One has recently merged with J. P. Morgan Chase Bank N.A. It is not known whether this also involves being the trustee. Bank One has not filed amended pleadings.

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## O[illegible]ION BELOW

The District Court case was before the Honorable Michael Bagneris, Division H, No. 2002-6261. The Court of Appeals case had the same name and had the number 2004-CA-2001. The Louisiana Supreme Court case had number 06-C-0040. In the District Court case and the Court of Appeals, Bank One, As Trustee, was granted Summary Judgment. The Louisiana Supreme Court refused writs.

## ISSUES BELOW AND BEFORE THIS COURT

Were there sufficient amounts of charges of "points and fees" to bring this loan under HOEPA and thereby give Velten a right to rescind the loan and save her home from being taken from her?

Did the court correctly apply the HOEPA amendments to the Truth in Lending Act?

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1257(a) to review the decision of the highest court of the State of Louisiana on an important issue of Federal law, which opinion is in conflict with other decisions of this Court and other Federal Circuit courts. This order of the Louisiana Supreme Court was handed down on April 28, 2006. The district court's judgment and the opinion of the Fourth Circuit Court of Appeals and the denial of writ are attached.

## LAW PROVISIONS INVOLVED

Petitioner raised the question as to the correct interpretation of what is a "point and fee" under HOEPA which act is an amendment to the Truth in Lending Act, 15 U.S.C.A. §§1601, 1639 and Sec. 31, 32 and 34 of Regulation "Z", 12 C.F.R. §§226.31, 226.32 and 226.34. "Points and fees" are one of the "triggers" that make a loan a HOEPA loan. If the "points and fees" are greater than 8% of the "total loan amount" the loan is a HOEPA loan under 15 U.S.C.A. §1602(aa)(1)(B)(i); Reg. Z 12 C.F.R. §226.32(a)(1)(ii).

## STATEMENT OF THE CASE

The Petitioner in this case is a female, WW II veteran and widow who lives on Social Security and a pension that her deceased husband earned while being a New Orleans policeman. She is presently over 84 years old and has survived the floods of Hurricane Katrina. Petitioner made a loan from Aegis Mortgage Corporation that was taken over by a trust when Bank One became the trustee on December 17, 1999. The total loan amount was $91,300.00. The loan discount was 6.74% or $6,154.99. See copy of HUD 1 attached.

Bank One admits that the loan discount was a "points and fee", L802. It also admitted that L808, Processing Fee to Aegis of $425.00; it was also admitted L809, Tax Service Fee to Aegis, $97.00; it also admitted L811, Flood Certificate to Aegis $18.00 were "points and fees" for a total of $6,694.99. The amount of the loan was $91,300.00. The total "points and fees" should be subtracted from this figure which would give a figure of $84,605.00. One must then find out what 8% of $84,605.00 is in order to find

what the minimum amount of "points and fees" a loan must have in order to be a HOEPA loan. This multiplication gives one a figure of $6,768.40.

With these figures you do not have a HOEPA loan because $6,694.99 is not greater than $6,769.40 by $73.41.

| | | |
|---|---|---|
| L802 | $6,154.99 | |
| L808 | 425.00 | |
| L809 | 97.00 | |
| L811 | 18.00 | |
| | $6,694.99 | Points and Fees admitted |

| | |
|---|---|
| Loan Amount | $91,300.00 |
| Less | 6,694.99 |
| Total Loan | $84,605.00 |
| | X 8% |
| 8% charges | $ 6,768.40 |

The issue, therefore, is whether any other charges on the HUD 1 statement is a "points and fees" under HOEPA and Reg. Z? The gap is less than $73.41. Any additional "points and fees" must also be first deducted from the loan amount to arrive at the total loan amount.

In the Circuit Court's opinion and therefore the opinion of the Louisiana Supreme Court, it was held that none of the other charges were "points and fees" under HOEPA and Reg. Z. This opinion on this issue is clearly erroneous.

## ARGUMENT

## REASON FOR GRANTING WRIT

The ruling of the Louisiana Courts is clearly contra to HOEPA and Regulation Z of Federal Reserve Board and

the Official Staff Commentaries on Reg. Z. This state court opinion violates the prior opinion of this Court stated in *Mourning vs Family Publication Service, Inc.*, 411 U.S. 356, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973) which stated that Congress delegated expansive authority to the Federal Reserve Board to interpret the Truth in Lending Act and therefore also the HOEPA amendments.

In the lower court's opinion they ignored HOEPA, Regulation Z and the Official Staff Commentaries of the Federal Reserve Board by not applying the HOEPA amendment to the Truth in Lending Act.

Furthermore, the lower court's opinion held that an "Appraisal Fee" of $325.00 (L803) was not a HOEPA fee pursuant to 15 U.S.C.A. §1605(4)(c). (This must be 15 U.S.C.A. §1605(e)(5) for there is no (4)(c)).

The lower court also held that a "Doc Prep to MRG" of $100.00 was not a HOEPA fee due to 15 U.S.C.A. §1605(e)(2).

That "Flood Cert. To Aegis" of $18.00, L311, is exempt by 15 U.S.C.A. §1605(e)(5). This is clearly wrong since Bank One admits that it was a "Points and Fees." The lower court's reason for the exemption is likewise erroneous.

That "Fair Plan Insurance" for $607.00, L903, is exempt due to 15 U.S.C.A. §1602(aa)(4).

That "Title Search", L1102 for $200.00; title examination, $200.00, L1103; Notary fee, $200.00, L1106 and title insurance, $311.00, L1108 are all exempt due to §1605.

That government recording fee, $100, L1201; transfer charges (city and county [parish]) tax stamp, $325.00, L1202 are exempt by §1605(d)(1).

WHAT THE LOWER COURT HAS DONE IS FAILED TO CORRECTLY APPLY 15 U.S.C.A. §1602(aa)(4), WHICH STATES:

> "For the purpose of paragraph (1)(B), points and fees shall include:
>
> (1) All items included in finance charges, *except* interest or the time price differential.
>
> (2) All compensation paid to the mortgage broker
>
> (3) Each of the charges listed in 1605(e) of this title except an escrow for future payment of taxes, unless. . . ." (The unless issue was never reached in the lower court's opinion where the creditor would have an opportunity to prove that the fee was reasonable.)

In Regulation Z, §226.32(b)(1)(i), it states that for "points and fees" all items required to be disclosed under §226.4(c) and §226.4(b) are "points and fees" except interest and time price differential. Under §226.32(b)(iii) it states that all fees and charges stated in §226.4(c)(7) are "points and fees" unless. This "*unless*" issue was never reached by the lower courts.

In §26.4(c) charges that are to be "points and fees" are title examination, abstract title, insurance, property survey, fee for the preparation of documents, notarial fees, credit report fees, property appraisal fee, inspection fee and pest infestation fee and amounts required to be paid into escrow or trust accounts if the amount would not otherwise be included in finance charge. See also Official Staff Commentary, §226.32(b). The lower court ignored these provisions of HOEPA, Regulation Z and commentaries.

The lower court excluded all of these fees from "points and fees" and gave no consideration to the new law, the new regulation and new commentaries.

Bank One, in its opposition, will suggest that Petitioner did not litigate each of these fee issues but any one of these fee issues would have made this a HOEPA loan. But, the big issue that first must be hurdled is the fact that the courts must give consideration to the HOEPA amendments to the Truth in Lending Act, amendment to Regulation Z and its commentaries.

## CONCLUSION

It is quite evident that the Court of Appeals' opinion is clearly wrong and this will begin a line of cases that allows for this misinterpretation of the law, regulations and commentaries contra to this court's opinion. This opinion was not altered by the Louisiana Supreme Court yet it was clearly erroneous. This case conflicts with Regulation Z as amended by HOEPA which the lower court did not realize or appreciate and thereby will mislead other courts to likewise incorrectly apply this law.

This is a relatively new amendment to the Truth in Lending Act. This amendment was passed by Congress to prevent predatory lending practices targeted at vulnerable consumers such as Petitioner.

If this Court does not want to issue a full writ due to its heavy schedule, it could at least remand the case to the lower courts with instructions to give consideration to the HOEPA amendments to the Truth in Lending Act.

This decision of the lower court should not be allowed to stand up as the law of HOEPA and therefore since it concerns the very basis of these amendments to the Truth in Lending Act as made by HOEPA, this Honorable Supreme Court should stop further misinterpretations of the law.

Respectfully submitted,

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917 So.2d 454

**Louisiana Case Law**

BANK ONE, NAT. v. VELTEN, 2004-2001 (La.App. 4 Cir. 8/17/05); 917 So.2d 454

BANK ONE, NATIONAL ASSOCIATION, as Trustee v. Marjorie Madere VELTEN aka

Marjorie Madere Hoffman Velten.

No. 2004-CA-2001.

Court of Appeal of Louisiana, Fourth Circuit.

August 17, 2005.

Rehearing Denied December 9, 2005.

Appeal from the Civil District Court, Orleans Parish, No. 2002-6261, Michael G. Bagneris, J.

Charles H. Heck, Jr. Dean Morris, L.L.P. Monroe, Louisiana for Plaintiff/Appellee.

Patrick D. Breeden, New Orleans, Louisiana, for Defendant/Appellant.

(Court composed of Judge PATRICIA RIVET MURRAY, Judge JAMES F. McKAY III, Judge MICHAEL E. KIRBY).

JAMES F. MCKAY III, Judge.

The defendant/appellant, Marjorie Madere Velten a/k/a Marjorie Madere Hoffman Velten (Marjorie Velten), appeals the district court's judgment granting a partial summary judgment in favor of the plaintiff/appellee, Bank One, National Association, As Trustee (Bank One). The trial court held that there were no genuine issues of material fact concerning the defendant's liability on the

promissory note and security agreements and that Bank One was entitled to enforce its security right in accordance with Louisiana Law. Furthermore, the trial court held that the points and fees, as evidenced by the disclosure statement, did not exceed the statutory eight percent (8%) of the total loan amount and therefore there was no genuine issue of material fact regarding the question of "high rate loan" pursuant to the Truth in Lending Act as amended by the Home Ownership and Equity Loan Protection Act (HOEPA), 15 U.S.C.A. et seq. Lastly, the trial court held that Bank One was not required to make any special disclosures pursuant to the act, and consequently Marjorie Velten does not receive the three (3) year rescission window. We agree.

## FACTS AND PROCEDURAL HISTORY

This case evolves from the purchase and foreclosure proceeding against Marjorie Velten referencing the subject residence located at 5524 Canal Boulevard. On December 13, 1999, the appellant initiated a promissory note, recorded as instrument No. 558526, in favor of Aegis Mortgage Corporation d/b/a/ UC Lending (Aegis) in the amount of $91,300.00, interest thereon at 9.363% per annum, and guaranteed by an act of mortgage securing property owned by the appellant. The appellant, made payments on this loan for approximately 1½ years before defaulting by failing to pay her mortgage installments.[1] On April 22, 2002, Bank One[2] filed a petition for executory process seeking to enforce the aforementioned note and mortgage

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[1] Appellant failed to reinstate or pay off her loan.

[2] Bank One became an assignee of AEGIS

agreement based on the appellant's default. On July 16, 2002, almost two and one half years after the initial loan was perfected, Marjorie Velten, through her attorney, sent a letter to Bank One advising that she was rescinding her loan. She advanced a defense alleging that the loan was promulgated pursuant to the Homeowner Equal Protection Act (HOEPA) **15 U.S.C.A. 1602,**[3] and argued that she had not received specific disclosures, as required by statute. She further argued that the applicable Act extended the time limit for rescission up to three years from the date that the loan originated. In response to this letter Bank One advised the appellant that they would not rescind the loan and would proceed with their foreclosure action.

On July 26, 2002, the appellant filed a petition for an order suspending the seizure and sale order and/or preliminary injunction and/or permanent injunction and/or damages. The hearing was set two days before the scheduled Sheriff's sale of the subject property. The trial court granted the **preliminary** injunction thereby canceling the Sheriff's sale of this property. Bank One took a writ to this Court in case No. 2002-C-2020, which we dismissed as untimely.[4] On December 5, 2002, pursuant to L.C.C.P art. 2644, Bank One converted the original executory proceeding to an ordinary proceeding. On November 4, 2003, Bank One filed a motion for summary judgment. On February

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[3] This is an amendment to the Truth In Lending Act (TILA), 15 U.S.C.A. 1601, 1639, 12 CFR 226.1, 226.30, 226.32 and 226.34: Code Federal Regulations 81438, December 26m, 200[illegible]d the National Consumer Law Center, Truth in Lending (4 ed. 1999, [illegible]. 597-603)

[4] Note that this Court did not dismiss this writ on its merits but only based on procedure.

19, 2004, the appellant filed an opposition. On June 18, 2004, the matter was heard and a decision was rendered in favor of Bank One granting their motion for summary judgment, finding that no genuine issues of material fact were in dispute, and that the subject loan was not a HOEPA loan.

## ASSIGNMENTS OF ERROR

The appellant advances numerous issues for review asserting that the trial court erred in granting summary judgment in favor of Bank One. The appellant asserts that the law of the case doctrine applies to this matter. We disagree with this assertion. Additionally, the other issues asserted by the appellant can be aggregated into one, that being whether this is a loan pursuant to HOEPA. The trial court held that it was not a HOEPA loan and we can find no reason in the record to disagree with this holding.

## STANDARD OF REVIEW

Appellate courts review the granting of summary judgment *de novo* under the same criteria governing the trial court's consideration of whether summary judgment is appropriate. *Reynolds v. Select Properties, Ltd.*, 93-1480, p. 2 (La. 4/11/94), 634 So.2d 1180, 1182; *Alexis v. Southwood Ltd. Partnership*, 2000-1124, p. 2 (La.App. 4 Cir. 7/18/01), 792 So.2d 100, 101. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. *Two Feathers Enterprises, Inc. v. First National Bank of Commerce*, 98-2004-0467 p. 3 (La.App. 4 Cir. 10/14/98), 720 So.2d 398, 400. This procedure is now favored and shall be construed to accomplish those ends. La. C.C.P. art. 966 A(2). A

summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966. If the court finds that a genuine issue of material fact exists, summary judgment must be rejected. *Oakley v. Thebault*, 96-0937, p. 3 (La.App. 4 Cir. 11/13/96), 684 So.2d 488, 490. The burden does not shift to the party opposing the summary judgment until the moving party first presents a *prima facie* case that no genuine issues of material fact exist. *Id.* At that point, the party opposing the motion must "make a showing sufficient to establish existence of proof of an element essential to his claim, action, or defense and on which he will bear the burden of proof at trial." La. C.C.P. art. 966(C).

## DISCUSSION

The appellant argues that the law of the case doctrine applies to the instant matter. We disagree.

Although the appellant fails to make a clear argument for this assignment of error, it appears that the appellant's argument is based on the fact that the trial court initially issued a **preliminary** injunction to thwart a sheriff's sale of the subject property. The appellee filed a writ with this Court, which we dismissed as untimely, never addressing the merits of the case.[5] Consequently, the law of the case doctrine argument cannot hold, as a **preliminary** injunction is not a final judgment, but merely an interlocutory order. Key to this issue is the fact, as previously noted that

[5] No. 2002-2020.

Bank One had converted the matter from an executory proceeding to an ordinary proceeding and obtained a partial summary judgment which in the instant matter is a final judgment.

A writ of preliminary injunction is essentially an interlocutory order issued in a summary proceeding incidental to the main demand for permanent injunctive relief. It is designed to and serves the purpose of preventing irreparable harm by preserving the status quo between the parties pending a determination on the merits of the controversy. *Bally's Louisiana, Inc. v. Louisiana Gaming Control Board*, 99-2617, p. 7 (La.App. 1 Cir. 1/31/01), 807 So.2d 257, 263; *Freeman v. Treen*, 442 So.2d 757, 763 (La.App. 1 Cir. 1983). The principal demand, as opposed to the injunction, is determined on its merits only after a full trial under ordinary process, even though the hearing on the summary proceedings to obtain the injunction may touch upon or decide issues regarding the merits. *Smith v. West Virginia Oil & Gas Co.*, 373 So.2d 488, 494 (La. 1979).

The law of the case doctrine refers to "(a) the binding force of trial court rulings during later stages of the trial, (b) the conclusive effects of appellate court rulings at the trial on remand, and (c) the rule that an appellate court will ordinarily not reconsider its own rulings of law on a subsequent appeal in the same case." *Petition of Sewerage and Water Bd. of New Orleans*, 278 So.2d 81, 83 (La. 1973); *Louisiana Land and Exploration Co. v. Verdin*, 95-2579, pp. 3-4 (La.App. 1 Cir. 9/27/96), 681 So.2d 63, 65. This doctrine "may bar redetermination of a question of law or a mixed question of law and fact during the course of a judicial proceeding." 1 Frank L. Maraist and Harry T. Lemmon, Louisiana Civil Law Treatise: Civil Procedure,

§ 6.7 (1999). Thus, the law of the case doctrine is the proper procedural principle, as opposed to *res judicata*, for describing the relationship between prior judgments by trial and appellate courts rendered within the same case. *Posey v. Smith*, 453 So.2d 1016 (La.App. 3 Cir. 1984). The policy reasons behind this doctrine include: (i) avoiding relitigation of the same issue, (ii) promoting consistency of result in the same litigation, and (iii) promoting efficiency and fairness to both parties by affording a single opportunity for the argument and decision of the matter at issue. *Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.*, 260 La. 325, 330, 256 So.2d 105, 107 (1971).

Unlike the statutory doctrine of *res judicata*, the jurisprudential doctrine of law of the case is a discretionary guide that will not be applied inflexibly. "Argument is barred where there is merely doubt as to the correctness of the former holding, but not in cases of palpable former error or so mechanically as to accomplish manifest injustice." *Petition of Sewerage and Water Bd.*, 278 So.2d at 83. In addition to the latter exception for palpable error, the jurisprudence has recognized two other contexts in which this discretionary doctrine will not be applied. First, it will not be applied to "supplant the Code of Civil Procedure provision which clearly permits a reconsideration of the overruling of peremptory exceptions." *Babineaux v. Pernie-Bailey Drilling Co.*, 261 La. 1080, 1094, 262 So.2d 328, 332-33; *Landry v. Blaise, Inc.*, 2002-0822 (La.App. 4 Cir. 10/23/02), 829 So.2d 661, 666. Second, it will not be applied when the underlying, operative facts upon which the court's prior decision was based have changed. *Morrison v. C.A. Guidry Produce*, 2003-0307 (La.App. 3 Cir. 10/01/02), 856 So.2d 1222, 1226-27. Under the "law of the case" doctrine, an appellate court ordinarily will not reconsider

its own rulings of the law in the same case. See *Liberty Bank and Trust Company v. Dapremont*, 2002-1504 (La.App. 4 Cir. 2/11/03), 844 So.2d 877, (see p. 892); *Evans v. Nogues*, 99-2761, p. 4 (La.App. 4 Cir. 9/13/00), 775 So.2d 471, 474; *Sharkey v. Sterling Drug, Inc.*, 600 So.2d 701, 705 (La.App. 1 Cir.). Clearly, there was no **permanent** injunction in this matter, nor was there a "final decree" as to the merits of any particular assertion made by the appellant. Moreover, a preliminary injunction is a summary proceeding and merely requires a *prima facie* showing of a good chance to prevail on the merits. *Mary Moe, L.L.C., v. Louisiana Bd. Of Ethics*, 03-2220, (La. 4/14/04), 875 So.2d 22. Accordingly, we find no merit to the appellant's assertion regarding the law of the case doctrine.

In the appellant's aggregated assignment of error, she asserts that the trial court erred in holding that the loan in question was not subject to HOEPA requirements.

The key issue for this Court to review is whether or not a loan, originated by AEGIS on December 13, 1999, was a "High Rate Loan", or a loan pursuant to HOEPA. The first step in this analysis is to review the settlement statement at closing, as defined by 15 U.S.C.A. 1602, and determining whether the "points and fees" payable by the consumer at or before closing, exceed the greater of eight percent (8%) of the total loan amount.

## TOTAL LOAN AMOUNT

The appellant argues that the "points and fees" exceed 8% of the total loan amount, which would trigger the implementation of the provisions of HOEPA. She asserts that Bank One miscalculated the amount, thereby avoiding the provisions of the statute.

The determination of whether the loan in fact falls within the province of HOEPA hinges upon the calculation of the "total points and fees," as well as the "total amount of the loan." *See* 15 U.S.C. § 1602(aa)(1); *Johnson v. Know Financial Group*, 2004 WL 1179335 (E.D.Pa.5/26/2004). According to *Johnson*, which we find presents a basic guideline to determine the "total loan amount", the court must first determine the "amount financed" as set forth by 12 C.F.R. § 226.18, which states:

> § 226.18 Content of disclosures.
>
> For each transaction, the creditor shall disclose the following information as applicable:
>
> (a) Creditor. The identity of the creditor making the disclosures.
>
> (b) Amount financed. The amount financed, using that term, and a brief description such as the amount of credit provided to you or on your behalf. The amount finances is calculated by:
>
> (1) Determining the principal loan amount or cash price (subtracting any down payment);
>
> (2) Adding any other amounts that are financed by the creditor and are not part of the finance charge; and
>
> (3) Subtracting any prepaid finance charge.

As evidenced by the settlement statement, the appellant's principal loan amount was ninety-one thousand three hundred dollars ($91,300.00).[6] To this amount, the

[6] All of the closing charges were financed and included in the principal balance.

court must add amounts financed by the creditor, which are not part of the finance charge. According to the settlement statement, there were no such amounts, as Aegis financed the entire amount of the loan, including the finance charges. Next the court must deduct any "pre-paid finance charge." Pursuant to 12 C.F.R. § 226.2(a)(23), defines "pre-paid finance charges" as "any finance charges paid separately in cash or by check before or at consummation of a transaction, or withheld from proceeds of the credit at any time." In the case *sub judice*, finance charges were "withheld from the credit," which was extended. The total finance charge was $6,694.99. Deducting the finance charges from the "principal loan amount" leaves an amount of $84,605.01, as the total amount financed.

Next, pursuant to *Johnson*, in order to arrive at the "total loan amount", the court must deduct from the "amount finance" any cost listed in 12 C.F.R. 226.32(b)(1)(iii). This statute sets forth:

> "(iii) All items listed in § 226.4(c)(7) (other than amounts held for future payment of taxes) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor . . . "

Consequently, the deduction must include only those items listed in § 226.4(c)(7),[7] which are unreasonable, or

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[7] 12 C.F.R. § 226.4(c) Charges excluded from the financial charge. The following charges are not finance charges.

> Sub. § (7) Real-estate related fees. The following fees in a transaction secured by real property or in a residential mortgage transaction, if the fees are bona fide and reasonable in the amount.

(Continued on following page)

paid to the creditor or an affiliate of the creditor. A review of the record reveals that the appellant has never asserted that any charge contained on the settlement statement was "unreasonable". In fact the affidavit of Irl Silverstein, which was an exhibit in the memorandum in support of the motion for summary judgment, addressed the issue of the "Doc Prep to MRG." The "Doc Prep" stands for document preparation fees charged by and paid to Middleberg, Riddle, and Gianna (MRG), 2323 Bryan Street, Suite 1000, Dallas, Texas 75201 for preparation of loan related documents. The record reflects that the appellant never challenged this charge either the truth therein as to MRG's relationship to the appellants or for the reasonableness of this charge. Consequently, the above fees can only be deducted from the "amount finance" if they are unreasonable or paid directly or indirectly to AEGIS or an affiliate. Thus, no charges under 12 C.F.R. 226.32(b)(1)(iii), or 12 C.F.R. 226.4(c)(7) are deducted from the amount financed. Therefore, the "total loan amount" is the same as the "financed amount", or $84,605.01.[8]

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(i) Fees for title examination, abstract of title, title insurance, property survey, and similar purposes;

(ii) Fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents;

(iii) Notary and credit report fees;

(iv) Property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed prior to closing, including fees related to pest infestation or flood hazard determinations;

(v) Amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.

[8] 8% of this amount is $6,768.40.

## POINTS AND FEES

To resolve the issue of whether the subject loan is an HOEPA loan, it is essential to determine whether the "points and fees" exceed 8% of the "total loan amount." To determine what charges on the settlement statement are "points and fees", the Court must follow 15 U.S.C.A. 1602(aa)(4), which states:

> For the purposes of paragraph (1)(B), points and fees shall include –
>
> (A) all items included in the finance charge, except interest or the time-price differential;
>
> (B) all compensation paid to mortgage brokers;
>
> (C) each of the charges listed in section 1605(E) of this title (except escrow for future payment of taxes), unless –
>
> (i) the charge is reasonable;
>
> (ii) the creditor receives no direct or indirect compensation; and
>
> (iii) the charge is paid to a third party unaffiliated with the creditor;

Also, in order for the Court to make this determination, it must look at the definition of "finance charge" as defined in 15 U.S.C.A. 1605. The statute provides:

> "Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include

charges of a type payable in a comparable cash transaction. The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges. Examples of charges which are included in the financial charge include any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount or other system of additional charges.

(2) Service or carrying charge.

(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation or credit report. . . ."

15 U.S.C.A. 1605 also provides exemptions from the computation of finance charges in sections "d" and "e", which provide:

(d) Items exempted from computation of finance charges in all credit transactions.

If any of the following items is itemized and disclosed in accordance with the regulations of the Board in connection with any transaction, then the creditor need not include that item in the computation of the finance charge with respect to that transaction:

(1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction.

(2) The premium payable for any insurance in lieu of perfecting any security interest otherwise required by creditor in connection with the transaction, if the premium does not exceed the fees and charges described in paragraph (1) which would otherwise be payable . . .

(e) Items exempted from computation of finance charge in extensions of credit secured by an interest in real property:

(1) Fees or premiums for title examination, title insurance, or similar purposes.

(2) Fees for preparation of loan-related documents;

(3) Escrows for future payments of taxes and insurance.

(4) Fees for notarizing deeds and other documents.

(5) Appraisal fee, including fees related to any pest infestation or flood hazard inspections conducted.

(6) Credit reports.

In consideration of the above factors, this Court has to determine what charges on the settlement statement, if any, are "financial charges" and what charges are "exempted".

On the settlement statement, there is listed a charge for "Loan discount of 6.47 to AEGIS MORTGAGE CORP" in the amount of $6,254.99. It is Bank One's position that this is a "points and fees" charge consistent with the above act and therefore, a determinative factor as to whether this particular loan is a HOEPA loan.

A second charge is listed as "Appraisal fee to Nick Leogio" in the amount of $375.00. Clearly, pursuant to 15 U.S.C.A. 1605(e)(5) this is an appraisal fee that is exempted. It is also exempt pursuant to 15 U.S.C.A. 1605(4)(c).

Another charge listed is the "Processing fee to Aegis" in the amount of $425.00. This point is not in contention because Bank One submits that this should be considered as a factor.

Also listed is a charge for "Tax Service Fee to Aegis" in the amount of $97.00. Bank One submits that this is a financial charge to be properly considered.

The next charge to consider is "Doc Prep to MRG" which is a $100.00 charge for document preparation by Middleberg, Riddle & Gianna. This is not a financial charge as documents specifically related to loan preparation are excluded pursuant to 15 U.S.C.A. 1605(e)(2).

Another charge in question is the "Flood Cert to Aegis" in the amount of $18.00, which is specifically exempt by § 1605(e)(5).

There are other charges which appellant disputes that can be summarily discounted as exempt: "Fair Plan Insurance," exempt under § 1602(aa)(4); "Title Charges," exempt under § 1605,[9] and "Government Recording and Transfer Charges," exempt under § 1605(d)(1).

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[9] "Abstract or title search to Irl R. Silverstein," $200.00; "Title Examination to Irl R. Silverstein," $200.00; "Notary fees to Irl R. Silverstein," $200.00; "Title Insurance to Irl R. Silverstein," $311.00.

From the above analysis, it can be concluded that the total amount which can be conclusively considered to be "financial charges" reach a total amount of $6,694.99.[10] In summation the "total amount loaned" was $84,605.01, which is $91,300.00 (total amount listed on Settlement Statement) minus "points and fee" in the amount of $6,694.99. This amount is clearly less than 8% of $84,605.01, and the loan clearly does not fall under the ambit of a "high interest loan," as contemplated in Title 15, and the "special disclosures" pursuant to HOEPA are not required in the instant matter. The trial court did not err in its calculations and in concluding that this loan was not a HOEPA loan.

Based on the law and the evidence before this Court, we find no error in the judgment of the trial court in its judgment holding that there are no genuine issues of material fact in dispute concerning the application of Title 15 U.S.C.A. 1601, *et seq.* Therefore, we affirm the judgment of the trial court granting Bank One's partial motion for summary judgment.

**AFFIRMED.**

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[10] Loan discount 6.74% to AEGIS, $6,154.99; Processing fee to AEGIS, $425.00; Tax service fee to AEGIS, $97.00; Flood cert. to AEGIS $18.00.

**CIVIL DISTRICT COURT FOR THE**
**PARISH OF ORLEANS**
**STATE OF LOUISIANA**

**NO.: 02-6261** **DIVISION "H-12"**

**BANK ONE,**
**NATIONAL ASSOCIATION, AS TRUSTEE**

**v.**

**MARJORIE MADERE VELTEN a/k/a**
**MARJORIE MADERE HOFFMAN VELTEN**

**FILED:** _____ _____
**DEPUTY CLERK**

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

**MOTION TO MAKE**
**JUDGMENT A FINAL JUDGMENT**

(Filed Jul. 6, 2004)

**NOW INTO COURT,** comes Marjorie Madere Velten a/k/a Marjorie Madere Hoffman Velten (*Velten*) for the purpose of moving the Court to make the judgment relative to the hearing on June 18, 2004 a final judgment notwithstanding the fact that it did not rule on all of the issues or causes of action and does not terminate the action as to all of the claims since there is no just reason for delay to have the Fourth Circuit Court of Appeals rule on the issues that were decided, thereby causing judicial economy. No trial date has been set, Bank One has no objection.

Respectfully submitted,
/s/ Patrick D. Breeden

Patrick D. Breeden, Esq.
LSBA No. 3440
830 Union Street, Suite 300
New Orleans, Louisiana 70112
504/524-1668 FAX: 504/524-1066

**FINAL JUDGMENT**

(Filed Jul. 6, 2004)

**CONSIDERING THE FOREGOING,**

**IT IS ORDERED, ADJUDGED AND DECREED** that the judgment on the hearing of June 18, 2004 be hereby designated as a final judgment granting Bank One's Motion for Summary Judgment on the note and declaring that Velten has no cause of action for rescission since there is no just reason for delay and notwithstanding the fact that it does not terminate the action since no trial date has been set and will thereby give the Fourth Circuit Court of Appeals an opportunity to review their ruling and since Bank One has no objection.

New Orleans, Louisiana this the 16th day of July, 2004.

/s/ Michael Bagneris
**JUDGE**

[/s/ Illegible]

**Louisiana Case Law**

BANK ONE v. VELTEN, 2006-0040 (La. 4/28/06)

BANK ONE, NATIONAL ASSOCIATION, AS TRUSTEE
v. MARJORIE MADERE VELTEN A/K/A
MARJORIE MADERE HOFFMAN VELTEN.

No. 2006-C-0040.

Supreme Court of Louisiana.

April 28, 2006.

IN RE: Velten, Marjorie Madere a/k/a; Velten, Marjorie Madere Hoffman; – Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. H, Nos. 2002-6261; to the Court of Appeal, Fourth Circuit, No. 2004-CA-2001

Denied.

CDT

PFC

BJJ

JPV

JTK

JLW

**SETTLEMENT STATEMENT**
**Optional Form for Transactions without Sellers**

**U.S. Department of Housing and Urban Development**

| | |
|---|---|
| Name & Address of Borrower:<br>MARJORIE MADERE VELTEN<br>5524 CANAL BOULEVARD<br>NEW ORLEANS, LA 70124 | Name & Address of Lender:<br>AEGIS MORTGAGE CORP.<br>D/B/A UC LENDING<br>8549 UNITED PLAZA BLVD.<br>BATON ROUGE, LA 70809 |
| Property location:<br>(if different from above)<br>5524 CANAL BOULEVARD<br>NEW ORLEANS, LA 70124 | Settlement Agent:<br>IRL R. SILVERSTEIN, PLC.<br>Place of Settlement<br>4051 VETERANS BLVD.<br>METAIRIE, LA |
| Loan Number:<br>0004-00005300426 | Settlement date: 12/13/99<br>Disbursement date: 12/17/99<br>File # 99651 |

| L. SETTLEMENT CHARGES | | |
|---|---|---|
| 800. | ITEMS PAYABLE IN CONNECTION WITH LOAN | |
| 801. | Loan origination fee % to | |
| 802. | Loan discount 6.74% to AEGIS MORTGAGE CORP. d/b/a | 6,154.99 |
| 803. | Appraisal fee to NICK LEGGIO | 375.00 |
| 804. | Credit report to | |
| 805. | Inspection fee to | |
| 806. | Mortgage ins. application fee to | |
| 807. | Mortgage broker fee to | |
| 808. | PROCESSING FEE TO AEGIS | 425.00 |
| 809. | TAX SERVICE FEE TO AEGIS | 97.00 |

| | | |
|---|---|---|
| 810. | DOC PREP TO MRG | 100.00 |
| 811. | FLOOD CERT TO AEGIS | 18.00 |
| 812. | | |
| 813. | | |
| 814. | | |
| 815. | | |
| 900. | ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE | |
| 901. | Interest from 12/17/99 to 1/1/00 @ $23.3307/day | 349.96 |
| 902. | Mortgage insurance premium for mos. ___ to | |
| 903. | Hazard insurance premium for 1 yrs. to FAIR PLAN INSURANCE | 607.00 |
| 904. | Flood Insurance 1 years to ALLSTATE INSURANCE | 507.00 |
| 905. | CITY OF NEW ORLEANS | 64.18 |
| 1000. | RESERVES DEPOSITED WITH LENDER | |
| 1001. | Hazard insurance mos @ $ per mo. | |
| 1002. | Mortgage insurance mos @ $ per mo. | |
| 1003. | City property tax mos @ $ per mo. | |
| 1004. | County property tax mos @ $ per mo. | |
| 1005. | Annual assessments mos @ $ per mo. | |
| 1006. | Flood insurance mos @ $ per mo. | |
| 1007. | Sanitary tax mos @ $ per mo. | |
| 1008. | mos @ $ per mo. | |

| | | |
|---|---|---|
| 1100. | TITLE CHARGES | |
| 1101. | Settlement or closing fee to | |
| 1102. | Abstract or title search to IRL R. SILVERSTEIN, P | 200.00 |
| 1103. | Title examination to IRL R. SILVERSTEIN, PLC. | 200.00 |
| 1104. | Title insurance binder to | |
| 1105. | Document preparation to | |
| 1106. | Notary fees to IRL R. SILVERSTEIN, PLC. | 200.00 |
| 1107. | Attorney's fees to (includes above item numbers ) | |
| 1108. | Title insurance to SILVERSTEIN TITLE AGENCY, LLC (includes above item numbers 1101-1107) | 311.00 |
| 1109. | Lender's coverage $ 91,300.00 | |
| 1110. | Owner's coverage $ | |
| 1111. | | |
| 1112. | | |
| 1113. | | |
| 1200. | GOVERNMENT RECORDING AND TRANSFER CHARGES | |
| 1201. | Recording fees: | 100.00 |
| 1202. | City/county tax/stamps: | 325.00 |
| 1203. | State tax/stamps: | |
| 1204. | | |
| 1205. | | |

| | | |
|---|---|---|
| 1300. | ADDITIONAL SETTLEMENT CHARGES | |
| 1301. | Survey to | |
| 1302. | Pest inspection to | |
| 1303. | COMMERCIAL CREDIT CORPORATION | 74,635.87 |
| 1304. | | |
| 1305. | | |
| 1400. | TOTAL SETTLEMENT CHARGES (enter on line 1602) | 84,670.00 |
| M. DISBURSEMENT TO OTHERS | | |
| 1501. | MARJORIE VELTEN & CAPITAL ONE | 251.00 |
| 1502. | MARJORIE VELTON & HOME DEPOT | 107.00 |
| 1503. | MARJORIE VELTEN & JC PENNEY | 426.00 |
| 1504. | MARJORIE VELTEN & DILLARD'S | 1,336.00 |
| 1505. | MARJORIE VELTEN & SEARS | 1,000.00 |
| 1506. | | |
| 1507. | | |
| 1508. | | |
| 1509. | | |
| 1510. | | |
| 1511. | | |
| 1512. | | |
| 1513. | | |
| 1514. | | |
| 1515. | | |

| | | |
|---|---|---|
| 1520. | TOTAL DISBURSED (to line 1603) | 3,120.00 |
| N. NET SETTLEMENT | | |
| 1600. | Loan Amount | $ 91,300.00 |
| 1601. | PLUS Cash/Check from Borrower | $ 0.00 |
| 1602. | MINUS Settlement Chgs (line 1400) | $ 84,670.00 |
| 1603. | MINUS Disbmnts. to Others (1520) | $ 3,120.00 |
| 1604. | EQUALS Disbursements to Borrower (after expiration of any applicable rescission period required by law) | $ 3,510.00 |

/s/ Marjorie Madere Velten
MARJORIE MADERE VELTEN

/s/ Irl R. Silverstein
IRL R. SILVERSTEIN, PLC.